Supreme Court, U.S.
FILED

031337 MAR 18 2004

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No.

In The
Supreme Court of the United States

BENJAMIN BARRY KRAMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE RULE CREATED BY THE SEVENTH CIRCUIT THAT FEDERAL PRISONERS MUST ESTABLISH THEIR "ACTUAL INNOCENCE" IN ORDER TO OBTAIN RELIEF IN HABEAS CORPUS UNDER 28 U.S.C. § 2241 FOR ALL CONSTITUTIONAL AND STATUTORY VIOLATIONS, EVEN WHEN THOSE CLAIMS HAD BEEN PRESERVED AT EVERY PROCEDURAL STAGE, VIOLATES THE "SUSPENSION CLAUSE"?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

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The City of Bell Gardens, CA
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TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Procedural History 4

Kramer's Conviction and Life Sentence 4

The Direct Appeal 6

The Section 2255 Litigation 7

The Habeas Litigation 8

B. The Seventh Circuit's Decision 10

REASON FOR GRANTING THE WRIT 11

I. THE COURT SHOULD GRANT THE WRIT TO UPHOLD HABEAS CORPUS JURISDICTION FOR FEDERAL PRISONERS WHO HAVE NOT PREVIOUSLY ABUSED THE WRIT THROUGH PROCEDURAL DEFAULTS AND REAFFIRM THAT LIMITATIONS ON HABEAS CORPUS JURISDICTION CANNOT BE IMPOSED WITHOUT A "CLEAR STATEMENT" FROM CONGRESS THAT THEY ARE INTENDED 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Blockburger v. United States,
284 U.S. 299,
52 S.Ct. 180,
76 L.Ed.2d 306 (1932) 11, 14-18, 21, 23

Bousley v. United States,
523 U.S. 614 (1998) 12

Calcano-Martinez v. I.N.S.,
533 U.S. 348 (2001) 9, 10, 11, 12, 14, 15

Cephas v. Nash,
328 F.3d 98 (2nd Cir. 2003) .....

Christopher v. Miles,
342 F.3d 378 (5th Cir.), *cert. denied*,
124 S.Ct. 950 (2003) 15

Cradle v. United States ex rel. Miner,
290 F.3d 536 (3rd Cir. 2002) 15

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 9, 10, 11, 12, 13, 15

Kramer v. Olson,
347 F.3d 214 (7th Cir. 2003)
(per curiam) 1, 10, 11

Paulino v. United States,
352 F.3d 1056 (6th Cir. 2003) 15

Richardson v. United States,
526 U.S. 813 (1999) 8, 14

Richardson v. United States,
119 S.Ct. 39 (1998) 8, 10, 12, 15

Rutledge v. United States,
517 U.S. 292 (1996) 7

Sawyer v. Holder,
326 F.3d 1363 (11th Cir.), *cert. denied*,
124 S.Ct. 258 (2003) 15

Sawyer v. Whitley,
505 U.S. 333 (1992) 12

Taylor v. Gilkey,
314 F.3d 832 (7th Cir. 2002) 9, 15

United States v. Kramer,
955 F.2d 479 (7th Cir.) *cert. denied sub nom.*
Fischer v. United States 506 u.s. 998 (1992) 6, 8

United States v. Kramer,
73 F.3d 1067 (11th Cir. 1996),
cert. denied , 519 U.S. 1011 5

United States v. Mazak,
789 F.2d 580 (7th Cir. 1986) 7

United States v. Richardson,
130 F.3d 779 (7th Cir. 1997) 8, 12

Wesson v. U.S. Penitentiary,
305 F.3d 343 (5th Cir. 2002), *cert. denied*,
537 U.S. 1241 (2003) 15

Zant v. Stephens,
462 U.S. 862,
103 S.Ct. 2733,
77 L.Ed.2d 235 (1983) 13

Statutes and Rules

U.S. Const., Article I 2, 9, 11

18 U.S.C. § 1952 5

21 U.S.C. § 846 7

21 U.S.C. § 848(a) 4, 14

21 U.S.C. § 848(b) 4, 5

28 U.S.C. §1254(1) 2

28 U.S.C. §2241 . . . . . 2, 8, 9, 15

28 U.S.C. §2255 . . . . . 3, 7, 8, 9, 10, 11, 12, 14, 15, 16

Sup. Ct. R. 13 2

No.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unreported opinion of the United States District Court for the Southern District of Indiana was rendered on April 23, 2003, and is attached hereto as **APPENDIX A**. The October 10, 2003, opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Kramer v. Olson*, 347 F.3d 214 (7th Cir. 2003) (per curiam), and is attached hereto as **APPENDIX B**.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit in *Kramer* was decided on October 10, 2003. Kramer filed a timely petition for rehearing en banc, which was denied by the Seventh Circuit on December 22, 2003. *See* **APPENDIX C**. The instant petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATUTORY PROVISIONS INVOLVED

[28 U.S.C.] § 2241. Power to grant writ

> (A) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courtss and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had....

[28 U.S.C.] § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

***

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

***

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

A. Procedural History

Kramer's Conviction and Life Sentence

On August 26, 1987, the government returned a two-count indictment against the Petitioner, Benjamin Barry Kramer (hereinafter "Kramer") and five co-defendants in the United States District Court for the Southern District of Illinois. The indictment named Kramer in two counts, only one of which (Count 1) is pertinent here. Count 1 charged Kramer with conducting a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848**(a)**, a crime which carried a sentence of 10 years to life with the possibility of parole. On January 26, 1988, however, the government returned a superseding indictment, amending the CCE count to charge Kramer under 21 U.S.C. § 848**(b)**, an offense carrying a mandatory sentence of life imprisonment without the possibility of parole. Section 848(b) was enacted on October 27, 1986. The CCE charge in Count was predicated on allegations of a "continuing series" of Title 21 "violations," all but one of which occurred ***before*** the effective date of § 848(b) – an importation of 137,000 pounds of marijuana into San Francisco in November 1986.

Kramer and two of his co-defendants went to trial between June and October 1988. The primary evidence against them came from three cooperating witnesses: Charles Podesta, Jeffery Tuchband, and James Blair. Kramer's defense at trial was that he withdrew from the CCE ***prior*** to the final shipment

to San Francisco.[1] The primary witness at trial against Kramer as to this shipment was Podesta. However, the government's own evidence established that, by early 1986, Kramer was viewed as a liability to the enterprise and was shunned by its principals. (*See* Tr. 1702-03.) Moreover, none of the arrangements for the San Francisco shipment or the off-loading in San Francisco were shown to have been done with Kramer's knowledge. Nor did Kramer administer, organize, or lead the importation in the United States of that marijuana or perform similar acts in its distribution after its arrival in this country.[2] Whatever minimal connections the government established between Kramer and the San Francisco load concerned preparatory activities by Kramer that occurred well in advance of the effective date of Section 848(b). (*See* Tr. 7668-7680.)

The government sought to connect Kramer to this key shipment primarily through Podesta's financial records that showed that Podesta collected $34,795,000 between November 23, 1986, and January 1987, and that Kramer had allegedly been paid $12,500,000 out of this sum. (Tr. 793, 800-816, 926-929, 943-947.) Kramer, however, argued that the payments, even if

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[1] Kramer is serving a separate 45-year sentence based on a parallel RICO conviction in the Southern District of Florida. *See United States v. Kramer*, 73 F.3d 1067 (11th Cir.), *cert. denied*, 519 U.S. 1011 (1996).

[2] Co-defendant Kay Dee Bell arranged for a barge to come into San Francisco and for its movement to locations to unload a cover load of lumber, load containers with marijuana and return to Bell's gravel yard for the unloading. (Tr. 4859-4893, 4930-4942, 4961-4972). Co-defendant Eugene Fischer and alleged co-conspirator George Brock provided workers who removed the marijuana and placed it in other containers. (Tr. 8512-8513.) The containers were subsequently transported to a warehouse rented by alleged co-conspirator Jeff Tuchband. (Tr. 662, 2516-2517.)

they occurred, did not establish that he was still an organizer or leader of the CCE after the effective date of Section 848(b).

As acknowledged by the Seventh Circuit's opinion herein, the trial court rejected Kramer's request for instructions which would have required the jury to unanimously agree on the predicate "violations" used to support the CCE charge – especially the critical San Francisco shipment. The jury deliberated for five days with five reported deadlocks before convicting the three defendants on all counts on October 4, 1988. Kramer was subsequently sentenced to a mandatory term of life under § 848(b).

The Direct Appeal

Kramer appealed his conviction to the United States Court of Appeals for the Seventh Circuit and continued to challenge the district court's failure to require a unanimous verdict on the predicate "violations" necessary for the CCE charge. Kramer also argued that the indictment and jury instructions violated his rights under the *ex post facto* clauses of the Constitution. In conjunction with these arguments, Kramer argued that he was factually innocent of the final San Francisco shipment.

On January 30, 1992, the Seventh Circuit affirmed Kramer's conviction and sentence, holding that juries considering CCE charges need ***not*** unanimously agree on the predicate "violations." *See United States v. Kramer*, 955 F.2d 479, 486-88 (7th Cir.), *cert. denied sub nom. Fischer v. United States*, 506 U.S. 998 (1992). Kramer and his co-defendants' unsuccessful petition for a writ of certiorari to this Court was

expressly based, in part, on the unanimity issue that had, by 1992, already resulted in a circuit split.

The Section 2255 Litigation

On April 22, 1997, Kramer filed a motion to vacate his conviction and sentence in the district court under 28 U.S.C. § 2255, arguing, among other things, that his separate conviction on Count 2 (for conspiring to distribute drugs under 21 U.S.C. § 846) violated his rights under the Double Jeopardy Clause of the Fifth Amendment in light of *Rutledge v. United States*, 517 U.S. 292 (1996). In a footnote, Kramer noted that the circuits continued to be split on the issue of whether a CCE defendant was entitled to a separate unanimous verdict instruction on the predicate "violations." However, since the Seventh Circuit had already ruled against his position in his own direct appeal (and this Court had declined to resolve the circuit split in Kramer's petition for a writ of certiorari), he was barred from raising the issue again in this, his first, § 2255 motion. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986). Kramer nonetheless stated that he "reserved the right to raise the issue again in the event the United States Supreme Court resolves this split in the Circuits in his favor." Petitioner's Memorandum In Support of Motion To Vacate, Set Aside, Or Correct Conviction and Sentence, at p. 8, n. 4.

On March 5, 1998, the district court entered an order vacating Kramer's § 846 conviction pursuant to *Rutledge*. The district court rejected the remainder of Kramer's claims and did not re-address the unanimity issue.

The Habeas Litigation

While Kramer's § 2255 litigation was pending, in November 1997, the Seventh Circuit was again faced with a challenge to lack of a separate unanimity instruction in CCE cases with respect to the "violations" comprising the "continuing series." In *United States v. Richardson*, 130 F.3d 779 (7th Cir. 1997), the Seventh Circuit reiterated its rejection of the argument, expressly relying upon its prior decision in *Kramer*. *See Richardson*, 130 F.3d at 799. On October 5, 1998, however, this Court granted Richardson's petition for a writ of certiorari in order to finally resolve the circuit split. *See Richardson v. United States*, 119 S.Ct. 39 (1998). On June 1, 1999, the Court issued its opinion in *Richardson* and expressly disagreed with the Seventh Circuit's ruling (and, by implication, the Seventh Circuit's earlier ruling in *Kramer*) holding that the predicate "violations" were essential elements of the CCE charge upon which juries must be required to unanimously agree beyond a reasonable doubt. *See Richardson v. United States*, 526 U.S. 813 (1999).

In light of this Court's decision in *Richardson*, on September 10, 1999, Kramer filed a Petition For a Writ of Habeas Corpus in the Southern District of Illinois, pursuant to 28 U.S.C. § 2241. Kramer argued that § 2241 was the appropriate vehicle to litigate the impact of *Richardson* on his case because § 2255 was "inadequate and ineffective" due to the statutory bar against filing "successive" § 2255 petitions. Kramer relied on the so-called "savings clause" in ¶5 of § 2255 which allows a prisoner to still seek habeas corpus relief if he can show that § 2255 was "inadequate or ineffective to test the

legality of his detention." Since Kramer had tried – at every procedural stage of his case – to raise the constitutional question finally decided in his favor in *Richardson*, and since § 2255 was unavailable to afford him any relief, he argued that relief must be available to him under Article I, § 9, cl. 2, of the Constitution and 28 U.S.C. 2241.

On July 25, 2002, the district court denied the petition without prejudice, holding that Kramer had to file the petition in the district in which he was incarcerated. Since Kramer was incarcerated in the federal penitentiary in Terra Haute, Indiana, he refiled his petition in the Southern District of Indiana. On April 23, 2003, however, the district court there denied relief with prejudice, ruling that courts – including the Seventh Circuit in *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002) – had engrafted an "actual innocence" requirement onto the "savings clause" and that Kramer did not satisfy this requirement. *See* **APPENDIX A**. The district court applied *Taylor* and the "actual innocence" requirement to Kramer even though the defendant in *Taylor* had procedurally defaulted his constitutional claim by not raising it during his direct appeal, *see Taylor*, 314 F.3d at 833-834, while Kramer ***had*** raised the claim but had been improperly denied. The district court also rejected Kramer's argument that this Court's decision in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001), precluded the imposition of an "actual innocence" requirement onto § 2255's savings clause, absent a "clear statement" from Congress that such a requirement was intended. *See St. Cyr*, 533 U.S. at 298-99 (limitations on habeas corpus jurisdiction must satisfy the "clear statement" rule). The district court refused to apply the Court's precedents in *St. Cyr and Calcano-Martinez* to the

"savings clause" context because no other federal court had yet done so and because the district court believed that this Court itself "has shown no interest in apply the principles of *St. Cyr* or *Calcano-Marintez* to savings clause cases." *Id.*

B. The Seventh Circuit's Decision

Kramer appealed the district court's ruling to the Seventh Circuit. Instead of setting the case for full briefing and argument, on May 12, 2003, the Seventh Circuit issued an order directing the parties to file jurisdictional memoranda. In his filing, Kramer continued to argue that this Court's opinions in *St. Cyr* and *Calcano-Marintez* precluded the imposition of an "actual innocence" requirement onto § 2255's savings clause since Congress had made no "clear statement" in § 2255 that such a requirement was intended. Alternatively, he argued that such a requirement in his situation (*i.e.*, where no prior default had occurred) violated the Suspension Clause. The Seventh Circuit, however, refused to give the issue full briefing and, instead, on July 10, 2003, issued its *per curiam* published opinion dismissing Kramer's appeal, essentially adopting the rationale of the district court. *See Kramer v. Olson*, 347 F.3d 214 (7th Cir. 2003) (per curiam), **APPENDIX B**. The Seventh Circuit accepted Kramer's argument that § 2255 was "inadequate and ineffective" to test the constitutionality of his detention in light of the timing of the *Richardson* decision. However, the Seventh Circuit found that in order for Kramer to avail himself of the "savings clause" in § Section 2255 he would have to establish his "actual innocence." Like the district court, the Seventh Circuit failed to distinguish between situations where claims had been previously defaulted and where, as here,

they had not. *See Kramer*, 347 F.3d at 217-18. Unlike the district court, the Seventh Circuit did not even cite, much less attempt to distinguish *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001).

Kramer filed a petition for rehearing *en banc* from the Seventh Circuit's opinion. On December 22, 2003, the Seventh Circuit summarily denied the petition. *See* **Appendix C**.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO UPHOLD HABEAS CORPUS JURISDICTION FOR FEDERAL PRISONERS WHO HAVE NOT PREVIOUSLY ABUSED THE WRIT THROUGH PROCEDURAL DEFAULTS AND REAFFIRM THAT LIMITATIONS ON HABEAS CORPUS JURISDICTION CANNOT BE IMPOSED WITHOUT A "CLEAR STATEMENT" FROM CONGRESS THAT THEY ARE INTENDED

A writ of certiorari should be granted because the Seventh Circuit's extension of the "actual innocence" requirement to situations where a prisoner has ***not*** committed a procedural default or previously abused the writ effectively suspended the writ of habeas corpus in violation of Article I, § 9, cl. 2. The Seventh Circuit's imposition of an "actual innocence" requirement also conflicts with recent precedents of this Court, *St. Cyr* and *Calcano-Martinez*, which require a "clear statement" from Congress before imposing limitations on habeas corpus jurisdiction.

Paragraph 5 of § 2255 bars a federal prisoner from raising even valid constitutional or statutory claims through a

federal court's habeas corpus jurisdiction "unless" § 2255 proves to be "inadequate or ineffective to test the legality of [the prisoner's] detention." However, the statutory bar to habeas relief does ***not*** also expressly state that prisoners must always prove their "actual innocence." Nor has this Court ever imposed such a requirement on access to habeas relief absent a procedural default.

The "actual innocence" requirement has its genesis in this Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), and several earlier cases involving abuses of the writ. The rule, as summarized by the Court in *Bousley* is straight forward: "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' [citations omitted], or that he is 'actually innocent,' [citations omitted." *Bousley*, 523 U.S. at 622. *See also Sawyer v. Whitley*, 505 U.S. 333 (1992). As previously demonstrated, Kramer expressly raised the unanimity issue in his direct appeal and at the first opportunity once *Richardson* was decided. Indeed, he raised the constitutional claim finally recognized by this Court in *Richardson* at each and every available opportunity that he possibly could.

Ignoring the distinction between preserved and defaulted claims, the Seventh Circuit herein extended the "actual innocence" requirement to a situation where the writ had ***not*** been abused or a claim defaulted and it did so without discussing, or even citing, this Court's 2001 decisions in *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001), and *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Both decisions involved the

proper construction of other habeas jurisdiction-stripping provisions of the AEDPA involving immigration laws.

In *St. Cyr*, this Court ruled that before a court should construe Congressional attempts to limit federal courts of habeas jurisdiction, the "clear statement" rule must be satisfied. *St. Cyr*, 533 U.S. at 298 ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.") (citations omitted). Under the "clear statement" rule:

> Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.

Id. at 299 (citation omitted). In construing Congressional efforts to limit habeas corpus jurisdiction, this Court in *St. Cyr* further ruled that two additional canons of statutory construction had to be satisfied:

> First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. [Citations omitted.] Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," [citation omitted], we are obligated to construe the statute to avoid such problems. [Citations omitted.]

Id. at 299-300.

One of the historic purposes of habeas corpus, the Court in *St. Cyr* recognized, was to test the legality of detentions "based on errors of law, ***including the erroneous application or interpretation of statutes***." *Id.* at 302 (footnote citing cases omitted; emphasis added). After citing several historical examples of the use of habeas corpus to challenge statutes, the Court ruled: "Most important, for our purposes, those early cases contain no suggestion that habeas relief in cases involving executive detention was only available for constitutional error." *Id.* at 302 (footnotes omitted). In light of this history, the Court concluded that before it would even address the constitutionality, under the Suspension Clause, of a congressional effort to limit habeas review of statutory violations, "a clear and unambiguous statement of congressional intent" was "requir[ed]." *Id.* at 305. *See also Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001) (reiterating the need for greater "clarity" from Congress, construing the jurisdiction-stripping provisions of the AEDPA to permit aliens to continue using § 2241 to raise "substantial constitutional questions").

In the instant case, Kramer's *Richardson* claim was obviously "substantial." To be sure, that claim arose out of the construction of a statute (21 U.S.C. § 848). However, as the Court in *St. Cyr* recognized, habeas corpus jurisdiction has historically extended to challenges to "the erroneous application or interpretation of statutes." *See St. Cyr*, 533 U.S. at 302. Yet, ***none*** of the prerequisites "required" by the Supreme Court in *St. Cyr* for limiting the availability of habeas corpus to only those who are "actually" and "factually" innocent were present here. Section 2255 contains no "statement" at al – much less a "clear" one – that such a requirement exists. Section 2255 was

"inadequate or ineffective" for Kramer "to test the legality of his detention" once *Richardson* was decided and deemed to be retroactive solely because he was barred from using it under a "Catch-22" created by the timing of the *Richardson* decision and other statutory limits Congress has placed on § 2255. Congress has not "articulated" any "specific and unambiguous statutory directive" imposing an "actual innocence" requirement in this setting. That requirement has been judicially created by the Seventh Circuit and courts in other circuits. Like the Seventh Circuit herein, courts that have imposed an "actual innocence" requirement have done so without any "clear statement" from Congress and, indeed, without any citation to, much less any discussion of, the holdings of *St. Cyr* and *Calcano-Martinez*. Not one of the post-*St. Cyr* cases that have construed ¶5 of § 2255 to impose an "actual innocence" requirement onto the use of § 2241 have so much as cited *St. Cyr*. Rather, all of the post-*St. Cyr* cases have simply adopted the holdings of pre-*St. Cyr* decisions. *See, e.g., Paulino v. United States*, 352 F.3d 1056 (6th Cir. 2003); *Christopher v. Miles*, 342 F.3d 378 (5th Cir.), *cert. denied*, 124 S.Ct. 950 (2003); *Cephas v. Nash,* 328 F.3d 98 (2nd Cir. 2003); *Sawyer v. Holder*, 326 F.3d 1363 (11th Cir.), *cert. denied*, 124 S.Ct. 258 (2003); *Taylor*, 314 F.3d at 835-36; *Wesson v. U.S. Penitentiary*, 305 F.3d 343, 348 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003); *Cradle v. United States ex rel. Miner*, 290 F.3d 536 (3rd Cir. 2002). Nor have these courts distinguished between situations where the claims were preserved or defaulted. In some of these cases, the claims were clearly defaulted. *See, e.g., Paulino*, 352 F.3d at 1057; *Taylor*, 314 F.3d at 832-33; *Cephas,* 328 F.3d at 100. Others were clearly not. *See, e.g., Christopher,* 342 F.3d at 380. In many, the issue of default is unclear, apparently because the factor was

not deemed to have any legal significance. None, therefore, focused on a prior procedural default as a requirement for imposing the "actual innocence" requirement.

An "alternative interpretation" of ¶ 5 of § 2255 is, therefore, "fairly possible." A prisoner who has consistently preserved a constitutional claim, but has been denied relief through the type of "Catch-22" at issue in this case, must be allowed a forum in habeas corpus. If not, § 2255 is unconstitutional under the Suspension Clause.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

BENJAMIN BARRY KRAMER,

Petitioner,

vs. 2:02-cv-00317-JDT-WTL

KEITH OLSON,

Respondent.

_____/

ENTRY DISCUSSING PETITION FOR WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus pursuant to 28 U.S.C § 2241, Benjamin Kramer asks the court to review the Seventh Circuit's interpretation of the language of the savings clause of 28 U.S.C. § 2255, and allow him to challenge his conviction and sentence for engaging in a continuing criminal enterprise ("CCE"), a violation of 21 U.S.C. § 848(b), in light of *Richardson v. United States*, 526 U.S. 813 (1999).

For the reasons explained in this Entry, Kramer's petition must be **denied**.

I. Background

Kramer is incarcerated at the United States Penitentiary at Terre Haute, Indiana, serving a sentence imposed by the United States District Court for the Southern District of Illinois.

On October 4, 1988, after a jury trial Kramer was found guilty of conducting a continuing criminal enterprise as a principal administrator, in violation of 21 U.S.C. § 848(b), and of conspiring

to distribute marijuana, in violation of 21 U.S.C. § 846. He was sentenced to life imprisonment without parole and a concurrent sentence of 40 years imprisonment. A forfeiture judgment of $60 million was also entered against Kramer. His conviction was upheld on direct appeal. See *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992), *cert. denied* 506 U.S. 998 (1992).

Kramer's 1997 motion pursuant to 28 U.S.C. § 2255 was granted in part and denied in part on March 5, 1998. *See Kramer v. United States*, No. 97-civ-4117-JLF (S.D.Ill. March 5, 1998). Kramer's conspiracy conviction was vacated pursuant to Rutledge v. United States, 517 U.S. 292 (1996), *remanded and denial of habeas aff'd,* 230 F.3d 1041 (7th Cir. 2000), *cert. denied* 531 U.S. 1199 (2001).

Following the Supreme Court's decision in *Richardson*, in September 1999, Kramer filed a petition pursuant to 28 U.S.C. § 2241 and motion pursuant to 28 USC. § 2255, which was dismissed without prejudice by the Southern District of Illinois on July 25, 2002.[1]

On December 20, 2002, Kramer filed the present motion pursuant to 28 U.S.C. § 2241, to which the United States responded.

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[1] Kramer brought his § 2241 petition in the Southern District of Illinois on the grounds that he could challenge the validity of his conviction and sentence under § 2241 because his remedy under § 2255 was inadequate and ineffective to test the legality of his detention. The district court found it lacked jurisdiction over this claim. Kramer's alternative motion under § 2255 was also dismissed for want of subject matter jurisdiction because it did not conform to the requirements of 28 U.S.C. § 2244(b)(3), 2255 ¶ 8.

II. Discussion

Kramer seeks relief pursuant to 28 U.S.C. § 2241, to which he is entitled if it is determined that he "is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* "Section 2255 is the primary collateral relief mechanism for federal prisoners," *Reyes-Requena v. United States*, 243 F.3d 893, 901 n.19 (5th Cir. 2001); however, Kramer has already pursued one § 2255 motion which was decided on the merits and he has not obtained the permission of the United States Court of Appeals before pursuing a second § 2255 petition. The fact that Kramer may not pursue a second § 2255 action at this juncture does not necessarily foreclose all relief. Section 2255 contains a "savings clause" for petitioners who may be barred by the successive petition requirements contained in the statute. *United States v. Prevatte*, 300 F.3d 792, 798 (7th Cir. 2002); see *Reyes-Requena*, 243 F.3d at 901 n. 19 ("the savings clause cannot create a detour around § 2255 such that § 2255 is rendered a nullity."). The "savings clause" of § 2255 allows a prisoner to bring a § 2241 petition if he can show that the § 2255 remedy is inadequate or ineffective to test the legality of [his] detention "*Garza v Lappin*, 253 F.3d 918, 921 (7th Cir.) (quoting 28 U.S.C. § 2255), *cert. denied* 533 U.S. 924 (2001).

A § 2241 petition is not, however, a substitute for a § 2255 motion, and the burden of coming forward with evidence to show the inadequacy or ineffectiveness of a § 2255 motion rests squarely on the petitioner. *McGhee*, 604 F.2d at 10. A prior unsuccessful § 2255 motion, or the inability to meet the second or successive requirements of the Antiterrorism and Effective Death Penalty Act

("AEDPA"), 28 U.S.C.A. § 2255, does not make § 2255 inadequate or ineffective. *Tolliver v. Dobre*, 211 F.3d 876, 878 (5th Cir. 2000). Thus, before turning to Kramer's substantive argument, this court must address the jurisdictional question and Kramer must demonstrate that he is permitted to challenge his conviction and sentence pursuant to 28 U.S.C. § 2241.

In *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), the Seventh Circuit found that "[a] federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion. *Id.* at 611. "A procedure for post-conviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned fore nonexistent offense." *Id.*[2] Judge Easterbrook offered further clarification of the savings clause requirements in *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002). "In re Davenport[], our only extended treatment of the language, holds that § 2255 is 'inadequate or ineffective to test the legality of [the] detention' when a legal theory that could not have been presented under §

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Seventh Circuit also provided three criteria for prospective savings clause petitions, including that: (1) the change of law had to have been made retroactive by the Supreme Court; (2) the change of law must be one that eludes the permission in § 2255 for successive motions; and (3) the change in law cannot be equated to a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated. *Id.* at 611-12. The parties agree that Kramer meets these criteria; however, it is with the general rule that he has a problem.

2255 establishes the petitioner's actual innocence." *Taylor*, 314 F.3d at 835. He explained that

> This is a subject on which the courts of appeals are in agreement. Every court that has addressed the matter has held that § 2255 is "inadequate or ineffective" only when a structural problem in § 2255 forecloses even one round of effective collateral review - and then only when as in *Davenport* the claim being foreclosed is one of actual innocence. See. e.g., *Cradle v. United States cx ref Miner*, 290 F.3d 536, 538-39 (3d Cir. 2002); in re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000) [holding that section 2255 is inadequate when an intervening statutory change of law makes the defendant's conduct no longer criminal), *cert. denied* 534 U.S. 1008 (2001)]; *Reyes v. Requena*, 243 F.3d [at] 902-03; *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001); *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) [holding that the savings clause applies when the claim is based on a retroactive Supreme Court decision that establishes that the petitioner was convicted for a nonexistent offense and that he had no reasonable opportunity previously to seek a judicial remedy)].

Taylor, 314 F.3d at 835-36; see also *United States v. Cooper*, 199 F.3d 898, 901 (7th Cir. 1999) (indicating that a valid claim of actual innocence would be enforceable under § 2241),

cert. denied 530 U.S. 1283 (2000); *Charles v. Chandler* 180 F.3d 753, 757 (6th Cir. 1999) (noting that no circuit had permitted a post-AEDPA petitioner was not effectively making a claim of "actual innocence" to utilize the savings clause of § 2255 to circumvent restrictions for filing subsequent petitions under § 2255); *Triestman v. United States*, 124 F.3d 361, 377-79 (2nd Cir. 1997) (holding that a petitioner barred by § 2255 can bring a petition under § 2241 in those cases in which "failure to allow for collateral review would raise serious constitutional questions"); *In re Dorsainvil*, 119 F.3d 245, 251(3rd. Cir. 1997) (holding that § 2241 relief is available in the "unusual circumstance" in which denial of a second petition would result in a "complete miscarriage of justice" because it would allow the punishment of a defendant for an act that is not criminal because of an intervening change of law).

Kramer's argument with his CCE conviction resulted from a constitutionally deficient jury instruction does not Illuminate any structural defect in § 2255 or present any fundamental error equivalent to actual innocence. Kramer's assertion that he was unable to develop his *Richardson* argument during his original § 2255 motion does not capture the sort of defect which can support a claim pursuant to the savings clause of § 2255. *See Jeffers v. Chandler*, 253 F.3d 327, 829 (5th Cir.) (denying a *Richardson* petition and requiring under § 2241 that a retroactively applicable Supreme Court decision establish that a petitioner is "actually innocent"), *cert. denied* 534 US. 1001 (2001); *Wesson v. US. Penitentiary Beaumont*, TX, 305 F.3d 343, 348 (5th Cir. 2002) (denying a *Richardson* petition brought by inmate who was

convicted and brought § 2255 petitions in the 7th Circuit and who thereafter brought petition under § 2241 in the 5th Circuit, based on a failure to show that he was convicted of a "nonexistent offense" as required by the "actual innocence" standard of *Reyes-Requena v. United States*, 243 F.3d at 902-03, and citing *Jeffers v. Chandler*, 253 F.3d at 829, as authoritative), *cert. denied* in *Wesson v. Chandler*; 123 S.Ct. 1374 (2003).

Kramer argues vigorously that when "a constitutional right is established and deemed retroactive, yet a prisoner aggrieved by the denial of that constitutional right is procedurally barred from seeking relief for that violation under § 2255, then the vehicle of § 2255 is patently 'inadequate or ineffective to test the legality' of the prisoner's 'detention' vis-a-vis that constitutional right." Addressing a related argument in *Taylor*, Judge Easterbook wrote: "How often to rerun a search for error is a question to which § 2255 ¶ 8 speaks directly, and the statutory limitation to a single collateral attack, unless the conditions of 2255 ¶8 (elaborated in 28 U.S.C. § 2244) have been met, does not render § 2255 inadequate or ineffective." *Taylor*, 314 F.3d at 835.

Kramer proposes that because the government did not argue actual innocence before the Southern District of Illinois, the issue was waived for future litigation. Kramer does not provide any support for this theory that an argument before a court in one jurisdiction limits issues raised in another jurisdiction, and Judge Foreman based his decision not on any complex procedural argument but on the basic proposition that Kramer had not named his custodian as respondent or filed in the district court that had jurisdiction over his custodian as required by the statute. *See*

Kramer v. United States, Civil No. 99- 0648-JLF, Memorandum and Order (S.D.Ill July 25, 2002). Logically, the issues developed in the present case before the court which has jurisdiction over the petitioner's custodian could differ dramatically from those issues offered to Judge Foreman, especially in light of the developing Seventh Circuit case law pertaining to the actual innocence issue. *See Taylor,* 314 F.3d 832 (decision issued in November of 2002).

Kramer then argues that the actual innocence requirement is not compelled by Seventh Circuit precedent because, at least in part, the factual matrix in *Taylor* is materially different from the present case. Kramer focuses on the procedural history of the claims before the court, stating that Taylor raised the relevant constitutional claim in his § 2255 petition but abandoned the litigation without filing an appeal. In contrast Kramer was procedurally barred from raising a *Richardson* claim in his § 2255 petition because he had raised it unsuccessfully on direct appeal.

Although procedural history may indeed distinguish Kramer's claim from the claim in *Taylor*, the Seventh Circuit and other circuit courts interpreting the savings clause language have placed their focus on the substantive claims at issue and not the procedural history of the litigants and their claims. The Fifth Circuit stated in *Reyes-Requena* that the standards articulated for the savings clause by various circuit courts "may not be framed in identical terms, but the following basic features are evident in most formulations: actual innocence and retroactivity." *Id.* at 903 (citing Triestman, 124 F.3d at 377; Davenport, 147 F.3d at 611; Wofford, 177 F.3d at 1243). The *Reyes-Requena* court also noted that "the core idea [the innocence requirement] is that the petitioner may

have been imprisoned for conduct that was not prohibited by law." *Reyes-Requena*, 243 F.3d at 903. This statement echos Judge Easterbrook's findings and comments in *Taylor*, and contrary to Kramer's assertion the requirement of actual innocence is compelled by Seventh Circuit precedent.

Kramer alleges that the courts, including the Seventh Circuit, that have "engrafted an actual innocence requirement" onto § 2255 have done so without citing the United States Supreme Court decisions in *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001) and *I.N.S. v. St. Cry*, 533 U.S. 289 (2001). He correctly recites that both Supreme Court decisions involve the proper construction of other "habeas-stripping" provisions of the AEDPA involving immigration laws. In *St. Cry*, the Supreme Court held that certain statutory provisions repealing discretionary relief from deportation did not apply retroactively to aliens who had pled guilty to aggravated felonies in reliance on the possibility of discretionary relief. The Supreme Court defined the scope of the *St. Cry* decision as follows:

> Unlike the provisions of AEDRA that we construed in *Felker v. Turpin*, 518 U.S. 651[] (1996), this case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction.

St. Cry, 533 U.S. at 300-301. The scope of the decision in *St. Cry* and also in *Calcano-Martinez* arguably makes those decisions inapplicable to the case at bar and the case law which has discussed the savings clause of § 2255. Certainly, Kramer has not pointed to a single court which has cited *St. Cry* or *Calcano-*

Martinez outside of the immigration law context. In addition, the principles and precedent employed by the Supreme Court in *St. Cry* are not new but described as "longstanding" by the Court and thus have been available for use in savings clause cases. *See St.. Cry*, 533 U.S. at 298 ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." (footnotes and citations omitted)). The Supreme Court has also shown no interest in applying the principles of *St. Cry* and *Calcano-Martinez* to savings clause cases. Most recently on March 3, 2003, the Supreme Court denied the petition for writ of certiorari in *Wesson v. U.S. Penitentiar yBeaumont, TX*, 305 F.3d 343, 348 (5th Cir. 2002). In *Wesson*, the petitioner argued that a showing of actual innocence in order to invoke the savings clause of § 2255 impermissibly denied him his constitutional right to file a § 2241 petition. The Fifth Circuit relied on the binding precedent of *Reyes-Requena* for its evaluation of whether the petitioner would be able to proceed under the savings clause of § 2255, and noted that it had previously held that the savings clause under § 2255 does not violate the Suspension Clause. *See Reyes-Requena*, 243 F.3d at 893, 901 n.19. Kramer's argument does not persuade this court to set aside the controlling law of this Circuit.

Finally Kramer argues that he can demonstrate that he is actually innocent of this CCE count because he always contested his guilt and that only through the non- unanimous verdict on the essential elements of the CCE charge was the government able to secure his conviction. This does not, however, amount to a claim

that Kramer was convicted of a nonexistent offense or that his conduct was such that it did not constitute a crime as required by *Davenport* and *Taylor*. A *Richardson* claim, however worthy, has no effect on whether the facts in Kramer's case would support his conviction for a substantive offense.

If Kramer cannot demonstrate that he is entitled to proceed with a § 2241 petition pursuant to the savings clause of § 2255, this court has no jurisdiction to hear the substantive claims raised by Kramer. Thus, the arguments related to the deficient jury instruction and harmlessness will not be discussed.

III. Conclusion

Unless the savings clause of 28 U.S.C. § 2255 applies, this court (being only the court for the district in which Kramer is confined, not the trial court) lacks jurisdiction over his action pursuant to 28 U.S.C. § 2241. *Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir, 1999). For the reasons explained in Part II of this Entry, the savings clause does not apply to Kramer habeas petition. Accordingly, his motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is denied, and this action must be dismissed for lack of jurisdiction.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Date: April 21, 2003

JOHN D. TINDER, Judge
United States District Court

APPENDIX "B"

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-2187

BENJAMIN BARRY KRAMER,
Petitioner-Appellant,
v.
KEITH E. OLSON, Warden, United States Penitentiary,
Terre Haute, Indiana,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. 2:02-cv-00317-JDT-WTL—John Daniel Tinder, Judge.

SUBMITTED JULY 10, 2003—DECIDED OCTOBER 10, 2003

Before FLAUM, Chief Judge, and BAUER, and MANION,
Circuit Judges.

PER CURIAM. Federal prisoner Benjamin Kramer petitioned for a writ of habeas corpus under 28 U.S.C. § 2241, challenging his conviction under Richardson v. United States, 526 U.S. 813 (1999). The district court concluded that Kramer could not proceed under § 2241 because the principal means of attacking a federal conviction, a motion to vacate under 28 U.S.C. § 2255, was not inadequate to test the legality of Kramer's conviction. The district court accordingly characterized Kramer's filing as a mislabeled § 2255 motion and dismissed for lack of jurisdiction because Kramer had once before sought relief under § 2255 and had not received our permission to do

so again. We affirm.

Between 1982 and 1986 Kramer and others imported several hundred thousand pounds of Columbian marijuana into the United States. A federal jury in the Southern District of Illinois found Kramer guilty of engaging in a continuing criminal enterprise ("CCE"), see 21 U.S.C. § 848, and of conspiracy to distribute marijuana, see id. §§ 846, 841(a)(1). Kramer was sentenced to a mandatory term of life imprisonment without parole on the CCE count (reflecting the jury's finding that Kramer acted as a principal administrator of the CCE), and to a concurrent term of 40 years' imprisonment on the conspiracy count. We affirmed. United States v. Kramer, 955 F.2d 479 (7th Cir.), cert. denied, 506 U.S. 998 (1992).

Several years later Kramer moved to vacate his convictions under § 2255. As relevant here, he argued that the Supreme Court's decision in Rutledge v. United States, 517 U.S. 292 (1996), rendered the convictions invalid. In Rutledge the Supreme Court held that conspiracy under § 846 is a lesser included offense of the CCE violation. See id. at 300. In light of Rutledge, Kramer's convictions for both conspiracy and CCE could not stand. Predictably, the district court vacated the conspiracy count (handing Kramer a rather hollow victory that eliminated the 40-year sentence but left the life sentence intact), subject to reinstatement should the CCE conviction itself ever be vacated.

Kramer now seeks exactly that, relying this time on Richardson v. United States, 526 U.S. 813 (1999), which also analyzes the CCE statute. The statute defines a "continuing criminal enterprise" as a violation of the federal drug laws that is part of a "continuing series of violations." See 21 U.S.C. § 848(c). Richardson

holds that each underlying violation in the "continuing series" is an element of the CCE offense. Richardson, 526 U.S. at 817-18, 824. Consequently, a jury must agree unanimously as to which predicate "violations" make up the "continuing series of violations." Id. at 815, 824. Richardson overruled this court's precedent that allowed for conviction without unanimity about the specific CCE predicates. See, e.g., Kramer, 955 F.2d at 486-87. Thus, in accordance with our pre-Richardson decisions, Kramer's jury was not told that it needed to agree about which underlying drug transactions comprised the continuing series, but only that it must agree that Kramer committed three violations of the federal drug laws.

With Richardson in his quiver, Kramer filed in the Southern District of Illinois what he styled a petition for a writ of habeas corpus under § 2241 or, alternatively, a § 2255 motion. The district court dismissed the suit because a § 2241 petition must be filed in the district with jurisdiction over the petitioner's custodian, see Samirah v. O'Connell, 335 F.3d 545, 551 (7th Cir. 2003), which in Kramer's case is the Southern District of Indiana. Alternatively, the court held that it lacked jurisdiction over a second § 2255 motion absent authorization from this court. See 28 U.S.C. § 2255 ¶ 8 (limiting prisoners to one collateral attack without appellate authorization); Carter v. United States, 312 F.3d 832, 833 (7th Cir. 2002). So Kramer refiled his § 2241 petition in the Southern District of Indiana.

The Indiana district court concluded that, despite the document's § 2241 label, it was really an unauthorized second § 2255 motion. The court noted that a prisoner may not use § 2241 to attack a conviction or sentence except in the narrow class of cases where § 2255 is "inadequate or ineffective" to test the legality of the

prisoner's detention. 28 U.S.C. § 2255 ¶ 5. Concluding that Kramer's Richardson claim did not bring him within that narrow exception, the court dismissed the petition for lack of jurisdiction. Kramer appeals.

Ordinarily § 2255 is the exclusive means for a federal prisoner to attack his conviction. But § 2255 contains a "savings clause" permitting prisoners to proceed under § 2241 (usually reserved for attacking the execution, not imposition, of a sentence) in those cases where § 2255 is "inadequate or ineffective to test the legality of [the] detention." 28 U.S.C. § 2255 ¶ 5. We have explained that § 2255 is "inadequate" when its provisions limiting multiple § 2255 motions prevent a prisoner from obtaining review of a legal theory that "establishes the petitioner's actual innocence." See Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002). Thus, Kramer must first show that the legal theory he advances relies on a change in law that both postdates his first § 2255 motion (for failure to raise a claim the first time around does not render § 2255 "inadequate") and "eludes the permission in section 2255 for successive motions." See In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998). Second, he must establish that his theory supports a non-frivolous claim of actual innocence. See Taylor, 314 F.3d at 835 ("Every court that has addressed the matter has held that § 2255 is 'inadequate or ineffective' only when a structural problem in § 2255 forecloses even one round of effective collateral review—and then only when as in Davenport the claim being foreclosed is one of actual innocence."); see also Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999) ("A valid claim of actual innocence would be enforceable under § 2241 . . . if relief under [§ 2255] was not . . . available.").

As to the first requirement, Richardson was decided after Kramer's first § 2255 motion, and so we focus on whether a claim under it satisfies the criteria to file a second § 2255 motion (making resort to § 2241 unnecessary). See 28 U.S.C. § 2255 ¶ 8. Kramer does not rely on new evidence of his innocence (the criteria for authorization under ¶ 8(1)), so he may obtain our authorization under ¶ 8 only if Richardson announces a new rule of constitutional law made retroactive by the Supreme Court, id. § 2255 ¶ 8(2).

Richardson does not announce a new constitutional rule. Rather, it interprets the statutory phrase "series of violations," and holds that it defines "several elements" of a CCE offense. Richardson, 526 U.S. at 815-18. Thus, although Richardson may have constitutional consequences (jury unanimity as to the specific violations), it is a statutory decision that does not state a new rule of constitutional law. See Lanier v. United States, 220 F.3d 833, 838 (7th Cir. 2000) ("Richardson simply articulated the meaning of 'continuing series of violations' in § 848 . . . ."); see also Gray-Bey v. United States, 209 F.3d 986, 989 (7th Cir. 2000) (statutory decision with "constitutional fallout" is not a " 'new rule of constitutional law' "). Consequently, Kramer's Richardson claim eludes the requirements for filing a second § 2255 motion.

Kramer now confronts the second, more onerous hurdle: actual innocence. To surmount the obstacle, Kramer analogizes himself to petitioners with claims under Bailey v. United States, 516 U.S. 137 (1995), and Jones v. United States, 529 U.S. 848 (2000),

who we have allowed to proceed under § 2241.[1] See In re Davenport, 147 F.3d at 611-12 (Bailey claim cognizable under § 2241); see also United States v. Prevatte, 300 F.3d 792, 802 (7th Cir. 2002) (same for Jones claim).

At first glance, Kramer's Richardson claim does resemble one based on Bailey or Jones. Bailey, Jones, and Richardson claims all rely on Supreme Court decisions interpreting a statute. In Bailey the Supreme Court held that mere possession of a firearm does not violate the "use" prong of 18 U.S.C. § 924(c), as had previously been the law in this circuit. Bailey, 516 U.S. at 137. Similarly, in Jones the Court reversed our interpretation of 18 U.S.C. § 844(i) and held that igniting a private residence (if linked to interstate commerce only by its receipt of interstate natural gas) does not violate the federal arson statute. See Jones, 529 U.S. at 850-51, 856-57. We allowed petitioners premising claims on those opinions to proceed under § 2241 because the unavailability of § 2255 effectively prevented them from obtaining review of what may have been a fundamental flaw in their convictions—the possibility that the convictions hinged on conduct Congress never intended to criminalize. See Prevatte, 300 F.3d at 802; Davenport, 147 F.3d at 611. In other words, § 2255 was inadequate because the asserted defect was one "so fundamental . . .

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Kramer also relies on Garza v. Lappin, 253 F.3d 918 (7th Cir. 2001). But Garza dealt with a claim that the petitioner's execution would violate international human rights norms, and is thus not particularly helpful for analyzing Kramer's claim. Additionally, the panel in Garza acknowledged the "very unusual facts" of that case, id. at 921, and we think its applicability beyond those facts is limited.

as having been imprisoned for a nonexistent offense." Davenport, 147 F.3d at 611; see also Cooper, 199 F.3d at 901 (discussing Davenport and noting that petitioner there was "convicted of a nonexistent crime, which in anyone's book is a clear miscarriage of justice").

Kramer's Richardson claim is distinguishable from those asserted under Bailey or Jones. After Bailey and Jones, certain prisoners could admit everything charged in their indictment, but the conduct no longer amounted to a crime under the statutes (as correctly understood). Unlike someone asserting a claim based on Bailey or Jones, Kramer cannot admit committing the charged conduct and still escape punishment under the CCE statute. The jury at Kramer's trial heard evidence establishing that he helped import seven massive boatloads of marijuana (weighing from 14,000 to 152,000 pounds) into the United States. Even though the jury was not required to agree unanimously about which of those seven transactions constituted the "series of violations," such a shortfall has no bearing on whether Kramer's conduct violated the CCE statute. See Jeffers v. Chandler, 253 F.3d 827, 831 (5th Cir. 2001) (per curiam) ("Richardson . .. has no effect on whether the facts in [petitioner's] case would support his conviction for a substantive offense."). Thus, he cannot advance a nonfrivolous claim that, after Richardson, he is actually innocent of conducting a criminal enterprise. Cf. Taylor, 314 F.3d at 836 (petitioner's claim that previous § 2255 motion was decided incorrectly was not a defect on par with a Bailey claim). We thus join the Fifth Circuit and the Eleventh Circuit in concluding that a Richardson claim is not the sort that will permit passage through the narrow opening of § 2255's savings clause. See Sawyer v. Holder, 326 F.3d 1363, 1366 (11th Cir. 2003) ("[A] Richardson claim is not

the type of defect that opens the portal to a § 2241 proceeding."); Jeffers, 253 F.3d at 830-31 (rejecting argument that Richardson claim could establish petitioner's actual innocence); see also Wesson v. U.S. Penitentiary Beaumont Tex., 305 F.3d 343, 347-48 (5th Cir. 2002) (per curiam) (same); cf. Cephas v. Nash, 328 F.3d 98, 107-08 (2d Cir. 2003) (holding that jury verdict of guilty on four substantive narcotics violations conclusively negated petitioner's "Richardson-based claim of actual innocence").

Accordingly, we AFFIRM the judgment of the district court dismissing Kramer's petition as an unauthorized successive § 2255 motion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "C"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois

December 22, 2003

Before

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. William J. Bauer, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

No. 03-2187

BENJAMIN BARRY KRAMER,

Petitioner-Appellant,

v.

KEITH E. OLSON, Warden,
United States Penitentiary,
Terre Haute, Indiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. 2:02-cv-00317-JDT-WTL
John Daniel Tinder, Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ordered that rehearing and rehearing *en banc* are DENIED.